

J U D G M E N T.

The accused in this case, HERBERT EDLINGTON CLARK, comes before this Court charged that he, the said HERBERT EDLINGTON CLARK on or about the 24th day of March 1949 in the Territory of New Guinea unlawfully and indecently dealt with one DUBAVI a girl under the age of 17 years.

It is important, as will be later seen, to note that this charge is one under Section 216 of the Criminal Code.

The accused, who is represented by Mr. Dudley Jones of Counsel, has pleaded "Not Guilty" to the charge, thus throwing upon the Crown the burden of proving every element of the offence charged beyond a reasonable doubt. If the Crown fails to attain that high standard of proof, it fails to overthrow the strong presumption of innocence raised in favour of every accused person and the accused is entitled to the benefit of the doubt and to his acquittal. It is necessary to bear in mind that it sometimes happens that an accused person may give an account disbelieved by the Court and still raise a sufficient doubt to secure his acquittal.

Charges of the present nature are notoriously easy to make and difficult to refute. Counsel for the defence has properly drawn the attention of the Court to the rule of practice under which Judges invariably warn juries of the danger of convicting without corroboration where the matter complained of is an offence of a sexual nature against a female and it is doubly necessary to issue such a warning where the female concerned is a very young person, as is the case here.

Counsel further drew attention to the fact that the evidence of an accomplice is suspect - Section 632 of the Criminal Code - providing that a person cannot be convicted on the uncorroborated testimony of an accomplice or accomplices.

Section 1 of the C.C. defining "Uncorroborated evidence."
In determining whether there is corroboration it is to be noted that it is a matter for the judge to determine whether the facts could constitute corroboration and a matter for the jury to determine whether the facts do constitute corroboration.

Before coming to the facts of the present case it is desirable to advert to Sections 6 and 7 of the Criminal Code Amendment Ordinance 1923-1939 - READ.

Pursuant to these Sections I determine that DUEWI the girl named in the indictment is a native girl under the age of 17 years. The medical testimony satisfies me that she is a girl who has not yet reached puberty. In view of these conclusions it becomes unnecessary for me to deal with the standard of proof referable to the particular issue of puberty. The evidence satisfies me also that she is vergo intacta, a fact not disputed by the defence.

Much of the evidence in the case is not in dispute. The accused patrol officer in the service of the Administration of the Territory was on patrol, when it came to his notice that a few coconuts had been taken without permission from a plantation. Having learnt that some children were said to be responsible he detailed Constable TUVA to bring them to him. Accordingly Constable TUVA went to BUSA Village and got DUEWI and another small girl MOPI and four young boys and brought them to NIUMENGA where the accused was, reaching there on the 23rd March, 1949.

On the way to NIUMENGA a sinister incident occurred, the Luluai APON, who accompanied TUVA said to TUVA that he might sleep with the girl DUEWI, who is aged between 12 and 13 years, but TUVA declined and after leaving the village of KASIA en route to NIUMENGA APON said to TUVA, "By and by we will take the Mary to Mr. Clark-" (in the sense of taking her to him for an immoral purpose). It is interesting to note that TUVA then replied "He is not a company master. It is not his fashion."

On arrival at NIUMENGA the accused interviewed the suspects and it had then become late and time for the evening

meal. The three police and the children were assigned to the police quarters. The police house being a small room about 10 feet by 8 feet in size the Luluai APON who in common with other village officials assume responsibility for the girl DUMWI, an orphan, in the presence and hearing of others asked the accused if it would be all right if he and DUMWI slept in the Kiap's house as the police quarters were full up. The accused answered "Yes."

The evidence establishes that APON and DUMWI arrived at the Kiap's house accordingly between 7 and 8, though DUMWI testified that it was in the middle of the night that she went to the Kiap's house. (one room). On arrival the accused was seated at his table reading and apparently took little heed of the two visitors. The girl made up her bed (as far as the possession of one blanket required it) and lay down in the corner opposite to where the accused had his bed made up straight on a ground sheet on the bamboo floor. APON talked a little to the accused and then said that he wished to sleep whereupon he went over and shared DUMWI's blanket.

The accused got undressed and into his night attire which consisted of a pair of "hospital" pattern pyjama trousers, what he himself describes as a veld blanket folded and wound round his middle. This blanket was a dark blue or black material and he had nothing else on. The accused put out the hurricane lamp and went to bed smoking a cigarette.

I am left in no doubt that on the night in question (the room having no windows and there being no moon) was as described "pitch dark."

APON then swore that the accused told him to ask the Meri, if he (the accused) could kiss her. APON continued that he spoke twice to the girl without getting a reply but the third time she did reply and he got up went over and touched the accused on the back saying "Get up, the Meri is all right." APON says that the accused got up, went over and got on top of the Meri and had sexual intercourse with her and that whilst he did so APON said to him "Take it easy with the Meri," and he replied "Yes." A

shot was heard and the accused got up from on top of the girl to speak to a reporting policeman and then returned to go on with the sexual act.

DUMWI's account differs. She says that APON spoke to the accused first and that after that the accused came over got on top of her, had intercourse with her causing her some vaginal pain and that there was an actual emission of semen by the accused into her vagina. Whilst this went on she says that the Luluai APON sat some few feet away. She says that she cried a little. She puts the acts of intercourse by the accused as a continuing one taking place when the shot was heard - a material divergence from APON's account of two acts.

She testified that it was a clear night with a moon and that she saw the accused take off his lap lap, a dark coloured one, and place it beside her before engaging in the intercourse, and she says that after that APON had intercourse with her.

Now APON realising the difficulty of establishing what took place between the girl DUMWI in the pitch dark is equal to the occasion and on being pressed he introduces a bizarre note, namely a commentary from the girl as to what the accused was doing to her. Telling APON to ask the accused not to continue kissing her but to have intercourse with her. And the accused then said that he conveyed the girl's requirements to Clark.

I think that a jury might consider such a conversation so unique as not to be worthy of credence. The girl DUMWI is a girl approaching puberty and obviously a girl whose mind is obsessed with matters pertaining to sex. She makes extravagant claims to sexual attention and I do not accept it as true that all the police "played" with her as she alleges. APON himself is accused by her of "playing" with her and admits the matter, though he now denies it and explains that he admitted it in the Lower Court "because she said so." It is to say the least a lame explanation and one which would be unacceptable to a jury who had had the benefit of observing the Luluai's demeanor, which seemed to me that of a crafty man.

It is a matter that must weigh greatly with a jury that

the police, curious to know of the events of that night asked next morning what had happened during the night between the Kiap and the Meri, and APON replied "Nothing." In this case too there is no evidence of any complaint by the girl DUMWI. It is a matter for reflection too that the policemen who reported the firing of the shots almost immediately after its discharge found the accused in his own bed, with APON and DUMWI sleeping together, and obviously nothing apparently wrong at the Kiap's house.

It is urged by the defence that the fact that the girl is virgo intacta completely falsifies her allegations, but in this I do not agree, though a jury may well say that it is a matter for surprise that the hymen remained unruptured in spite of the experiences alleged by DUMWI. Unfortunately we have no medical testimony on this point to assist us.

The position of YENGIN is curious. He was the man responsible for the report to the police at Lae. His evidence shows either APON is a liar or he was bringing strong influence to make APON report about Clark. It is for the jury to consider whether that influence was to cause a false report or merely a true report, APON being reluctant to make because of his part. If the pressure was merely to make a truthful report it is strange that he does not frankly admit it.

A jury with experience of the Territory would find it strange in a story such as has been presented to the Court that no mention has been made at any stage about "pay" for the girl or her relatives and may ask themselves is the whole story a fabrication and this aspect overlooked.

Bearing in mind too that the girl DUMWI was sleeping with the Lulual APON a jury might consider it strange that the accused should be alleged to have gone over to the girl rather than the girl being sent over to him. If APON is to be believed the girl was not averse to Clark's attentions and would therefore presumably have been content to slip over in the pitch dark to the Kiap's bed. Those are all matters for the jury to reflect upon.

Now the accused was manifestly foolish in allowing the

girl to sleep in the house and all officers coming to the Territory should be made aware of the peril arising from such a course. He has gone into the box and on oath flatly denied the allegations made against him. Evidence has been adduced as to his unblemished character. I am mindful of the unsought testimonial to his general reputation with native women expressed by TUVVA before the matter of the alleged offence had actually occurred.

The accused has attempted to assign motives for the accusation made against him, but I do not think it profitable to inquire into them. In most cases it seems unlikely that it would be possible to establish a motive. It would be a matter for conjecture and that there might be some definite motive alleged by the defence is just a circumstance to weigh with the rest of the evidence.

In this case I have formed as a jury a low estimate of the credibility of the main actors DUMWI and APON, and as a jury I can only treat them as unreliable. The case for the Crown must of course rest upon their testimony. I am therefore left in a reasonable doubt and the accused is entitled to the benefit of that doubt.

Accused stand up. I find you NOT GUILTY and you are discharged.

26/9/49.

E.B. BIGNOLD.

A.J.